

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Policies and Rules for the )

Direct Broadcast Satellite Service )

IB Docket No. 98-21

**DOCKET FILE COPY ORIGINAL**

**REPLY COMMENTS OF THE STATE OF HAWAII**

The State of Hawaii (the "State") hereby replies to the comments that were filed on April 6, 1998 in response to the Commission's Notice of Proposed Rulemaking (the "Notice") in the above-captioned proceeding.<sup>1</sup> As the State emphasized in its initial comments, clarifications and modifications of Section 100.53 are badly needed to expedite the provision of Direct Broadcast Satellite ("DBS") service to Hawaii, which still lacks any DBS service. While supporting the general thrust of the Commission's proposals in paragraphs 32-36 of the Notice, the State urged the Commission to specifically modify Section 100.53 as follows:

1. Expand the scope of the geographic service obligations beyond DBS operators to include other forms of MVPD satellite providers, including those that operate either geostationary-satellite orbit ("GSO") satellites in the Ka-band or foreign satellites in the DBS band;
2. Clarify that Section 100.53(b) applies to DBS licensees who were granted their authorizations prior to January 19, 1996 and who: (a) request extensions of time; (b) request license renewals; or (c) replace any satellite;
3. Do not delete Section 100.53(a), but instead clarify that Section 100.53(a) requires DBS licensees to provide full DBS service to Hawaii and Alaska from their western orbital slots by the end of their western orbital slot milestones or else forfeit their western orbital slots;
4. Adopt an "offshore states" policy that requires that DBS licensees provide full DBS service to Hawaii and Alaska before they are eligible to provide service from any eastern orbital channel beyond their existing assignments; and

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<sup>1</sup> Policies and Rules for the Direct Broadcast Satellite Service, Notice of Proposed Rulemaking, IB Docket No. 98-21, FCC 98-26 (released Feb. 26, 1998) ("Notice").

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5. Clarify that the “full” DBS service required by Section 100.53’s geographic service obligation means that Hawaii and Alaska subscribers are entitled to receive DBS programming that is of equal value with that offered to subscribers in the continental United States (“CONUS”), and at equivalent prices.

**I. THE RECORD CLEARLY DEMONSTRATES THAT HAWAII DOES NOT RECEIVE ANY DBS SERVICE AND DBS PROVIDERS OFFER NO SOLUTIONS TO THIS PROBLEM**

A review of the comments filed by the DBS providers confirms the need for Commission action. None of the DBS providers disputes the fact that Hawaii continues to lack any DBS service. Yet, none of the DBS providers offer any useful solutions for correcting this problem of nonexistent DBS service.

For example, Loral Space shows no concern for Hawaii and Alaska, simply stating that the Commission should “continue to permit each DBS service provider to use its discretion to develop their (sic) DBS assets as the market will permit it.”<sup>2</sup> Loral fails to mention that its affiliate, R/L DBS Company, is required to provide service to Hawaii and Alaska pursuant to a 1997 Commission order.<sup>3</sup>

TEMPO similarly argues that the Commission should let “existing market forces” determine Hawaii and Alaska’s fate.<sup>4</sup> TEMPO’s claim that it has designed a DBS satellite capable of serving Hawaii and Alaska “[w]ithout the necessity of government regulation” is disingenuous at best because the Commission conditioned the grant of TEMPO’s launch authority on its

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<sup>2</sup> Comments of Loral Space & Communications Ltd. at 4. (filed Apr. 6, 1998).

<sup>3</sup> See Loral Corporation, 12 FCC Rcd 21164, 21174-75 (1997); 12 FCC Rcd 24325, 24335-36 (1997).

<sup>4</sup> Comments of TEMPO Satellite, Inc. at 6. (filed Apr. 6, 1998) (“TEMPO Comments”).

commitment to serve Hawaii and Alaska, as required by Section 100.53(b) of the Commission's rules.<sup>5</sup>

EchoStar promises that it will "soon introduce the first-ever DBS service to Alaska and Hawaii from the 119° W.L. orbital location."<sup>6</sup> This promise, however, is of questionable value because EchoStar's proposal is currently being hotly contested by TEMPO and others.<sup>7</sup> Furthermore, EchoStar alleges that its promise to provide DBS service to Hawaii and Alaska is voluntary because "it is not required to do so under the current rules."<sup>8</sup> As in the case of TEMPO, this claim is disingenuous because EchoStar's offer is contingent on the Commission granting it a waiver of its Section 100.53(b) obligation to serve Hawaii and Alaska from the 148° W.L. orbital slot.<sup>9</sup>

DirecTV argues that no clarifications or modifications to Section 100.53 are required because "service to Hawaii will soon materialize."<sup>10</sup> This is the exact same argument used

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<sup>5</sup> See Notice at ¶ 32 & n.78; TEMPO Satellite, Inc., DA 97-355, at ¶ 5 (released Feb. 24, 1997); 47 C.F.R. § 100.53(b).

<sup>6</sup> Comments of EchoStar Communications Corporation at 9 (filed Apr. 6, 1998) ("EchoStar Comments").

<sup>7</sup> See, e.g., TEMPO Satellite, Inc., "Supplemental Filing," EchoStar Satellite Corp. et al. – Application for Authority to Make Minor Modifications to Direct Broadcast Satellite Authorizations, Launch and Operation Authority, File Nos. DBS-88-01/68-SAT-ML-96, DBS-88-02/6-SAT-ML-97, DBS-74-SAT-P/L-96 (filed Mar. 27, 1998).

<sup>8</sup> EchoStar Comments at 9.

<sup>9</sup> See EchoStar Satellite Corporation et al., "Application For Minor Modifications of DBS Authorizations, Launch and Operation Authority," File Nos. DBS-88-01/68-SAT-ML-96, DBS-88-02/6-SAT-ML-97, DBS-74-SAT-P/L-96 (filed Dec. 30, 1997) at 10-14.

<sup>10</sup> Comments of DIRECTV, Inc. at 18 (filed Apr. 6, 1998).

back in 1995 by USSB in its effort to thwart the Commission's adoption of Section 100.53(b).<sup>11</sup> It is now 1998, Hawaii still does not have any DBS service, and USSB's argument has proven to be an empty promise. The Commission presciently did not accept this empty promise back in 1995 and it should not accept it now.

In conclusion, the comments of the DBS providers demonstrate that they are in no hurry to provide service to Hawaii and Alaska, and will not do so unless required. Some of the DBS providers (i.e., EchoStar and TEMPO) go so far as to mischaracterize their obligations under Section 100.53(b) as voluntary commitments!<sup>12</sup> A clarification and strengthening of Section 100.53 by the Commission is, therefore, needed to ensure that Hawaii and Alaska not only receive DBS service expeditiously, but that they receive DBS service of equal quality to that offered on the mainland U.S. and at an equal price.

## **II. THE COMMISSION CORRECTLY DETERMINED THAT THE GEOGRAPHIC SERVICE OBLIGATIONS OF SECTION 100.53(B) APPLY TO ALL DBS PROVIDERS THAT OBTAIN ANY TYPE OF DBS AUTHORIZATION AFTER JANUARY 19, 1996**

In the Notice, the Commission states that it has granted authorizations to three DBS service providers since January 19, 1996 – MCI, EchoStar, and TEMPO. In December 1996, MCI and EchoStar were “authorized to construct, launch and operate” DBS satellites in the 110° W.L.

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<sup>11</sup> See Policies and Rules for the Direct Broadcast Satellite Service, 11 FCC Rcd 9712, 9761 (1995) (“USSB asserts that the rule is unnecessary since progress in DBS will soon bring service to Alaska and Hawaii”).

<sup>12</sup> There is no doubt but that these so-called “voluntary commitments” would never have been made if not for the geographic service requirements of Section 100.53.

and 148° W.L. orbital slots, respectively.<sup>13</sup> Similarly, in February 1997, TEMPO was granted “authority to construct, launch and operate” a DBS satellite in the 118.8° W.L. orbital slot.<sup>14</sup> Pursuant to Section 100.53(b), all three of these DBS providers are required to provide service to Hawaii and Alaska immediately upon commencing service.<sup>15</sup>

TEMPO argues in a footnote that it does not consider the February 1997 order granting it launch authority to activate Section 100.53(b) obligations.<sup>16</sup> In fact, it does not even acknowledge that the February 1997 order granted it launch authority, instead characterizing the order as merely granting its modification application to alter its antenna design. This argument cannot be taken seriously. The February 1997 order granting TEMPO launch authority is no different from the December 1996 orders granting EchoStar and MCI launch authority. All similarly-situated DBS providers are subject to Section 100.53(b)'s geographic service obligations.

Furthermore, these obligations are activated by all different types of “post-January 1996” DBS authorizations. The term “authorizations” in Section 100.53(b) is in the plural and thus

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<sup>13</sup> See Application of EchoStar DBS Corporation, 12 FCC Rcd 11946, 11949 (1996); Application of MCI Telecommunications Corporation, 12 FCC Rcd 12538, 12542 (1996).

<sup>14</sup> See TEMPO Satellite, Inc., DA 97-355, at ¶ 36 (released Feb. 24, 1997).

<sup>15</sup> The Commission failed to mention R/L DBS Company as a “post-January 1996” DBS provider. This is an oversight that should be corrected. On May 14, 1997, the Commission granted R/L DBS Co.’s application for assignment of Continental Satellite Corporation’s DBS construction permit. In the order of grant, the Commission stated:

The *DBS Order* requires [that] those holding DBS permits or licenses provide DBS service to Alaska and Hawaii, accordingly, upon assignment, we will expect R/L DBS to provide DBS service to Hawaii and Alaska.

Loral Corporation, 12 FCC Rcd 21164, 21174 (1997); 12 FCC Rcd 24325, 24335 (1997) (italics in original).

<sup>16</sup> See TEMPO Comments at 6 n.13.

covers a variety of Commission actions including permits, licenses, or other authorizations such as launch authority. If the Commission had intended for Section 100.53(b) to apply only to permits or licenses, it would have stated so expressly, as it did in Section 100.53(a). Instead, the Commission chose the term “authorizations” for Section 100.53, which is a much broader term than the “permits or licenses” phrase in Section 100.53(a) or the “construction permit” phrase in Section 100.19(b).

TEMPO’s objection to Section 100.53 obligations is curious given that its satellite at 119° W.L. is technically capable of serving Hawaii. In fact, this technical capability to serve Hawaii is now available to all DBS providers. In its 1995 order adopting Section 100.53, the Commission decided not to impose Section 100.53(b) obligations on existing permittees because their satellites were already operational or their satellite construction was virtually complete.<sup>17</sup> This rationale no longer applies. All DBS providers currently seeking launch authority have been on notice since December 1995 that their satellites should be technically capable of serving Hawaii. Since that time, therefore, they have been required to design and construct satellites that serve Hawaii. There is absolutely no valid reason why any DBS provider should launch a satellite today that is not technically capable of serving Hawaii. For this reason, the Commission should clarify that Section 100.53(b) obligations attach to any DBS provider that has been granted launch authority since January 19, 1996, including TEMPO.

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<sup>17</sup> See Revision of Rules and Policies for the Direct Broadcast Satellite Service, 11 FCC Rcd 9712, 9761 (1995).

### III. CONCLUSION

Hawaii receives no DBS service today, even though Section 100.53 was adopted more than two years ago. The DBS providers offer no useful solutions to correct Hawaii's lack of DBS service. The Commission should, therefore, clarify and strengthen Section 100.53 in the manner suggested by the State in its initial comments and as supplemented by these reply comments.

Respectfully submitted,

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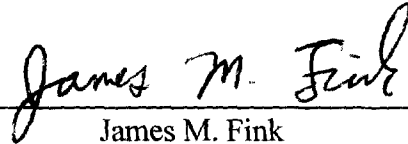
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April 21, 1998

## CERTIFICATE OF SERVICE

I, James M. Fink, do hereby certify that on this 21st day of April, 1998, I have caused a copy of the foregoing "Reply Comments of the State of Hawaii" in IB Docket No. 98-21 to be served via hand delivery upon the persons listed below.

  
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